LIBRARY
SUPREME COURT U. S.

Supreme Court, U. S.
FILED
MAY 25 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1518

PEPI, INC., PHILIPS ELECTRONICS INSTRUMENTS INC. and NORTH AMERICAN PHILIPS CORPORATION,
Petitioners

v.

ARTHUR H. PITCHFORD and PITCHFORD SCIENTIFIC INSTRUMENTS CORPORATION,
Respondents

Reply Brief In Support of Petition For Writ of Certiorari

PAUL H. TITUS
THOMAS M. KERR
BERNARD D. MARCUS
JON HOGUE
415 Oliver Building
Pittsburgh, Pennsylvania 15222
RALPH W. STULTZ
100 East 42nd Street
New York, New York 10017
Attorneys for Petitioners

Financial Press Corporation, Pittsburgh

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1518

PEPI, INC., PHILIPS ELECTRONIC
INSTRUMENTS, INC.
and NORTH AMERICAN PHILIPS CORPORATION,
Petitioners

v.

ARTHUR H. PITCHFORD and PITCHFORD
SCIENTIFIC INSTRUMENTS CORPORATION,
Respondents

Reply Brief In Support of Petition For Writ of Certiorari

A petition should be considered on the facts presented in the petition and on the importance of the legal issues posed by those facts. The Brief in Opposition to the Petition for Writ of Certiorari seeks to avoid the importance of the issue raised in Question 1 of the petition by refusing to consider the facts presented by the petition.

1. The respondents recognized the validity of the legal proposition that they had the burden of establishing that "Pitchford Scientific, during the damage period, was constantly engaged in an active, sustained and real effort to

expand its territorial boundaries and that it suffered damage as a result of not being permitted to do so." (Brief for Respondents in Opposition, p.7)

2. In an effort to avoid the full implications of the first issue posed by the petitioners the respondents have undertaken their own review of the evidence which they contend establishes market foreclosure as a result of territorial restrictions. While the evidence cited by the respondents in their brief relates to periods long before 1966 or is otherwise without probative value, even if that were not true, the crucial fact is that respondents' recitation of evidence is not relevant to this Court's consideration of whether to grant the writ. The important fact is that the Court of Appeals reviewed the entire record and found that:

> "The evidence of enforcement of territorial restrictions against Pitchford itself during the damage period is wholly circumstantial." (App. 17a)

The Court of Appeals then went on to state that it could find no instance of any lost sale or lost profit during the damage period. (App. 22a)

Against this background it does no good for respondents to urge that the evidence would meet the correct legal test set forth in the petition. The Court of Appeals took a different view of the record and applied a different legal test which is fundamentally wrong.

3. The function of the writ of certiorari is to resolve important questions of law and not to resolve the facts of individual cases. The failure of the Court of Appeals to require that an antitrust claimant produce direct evidence of its genuine efforts to enter a new market was as a matter of law incorrect. That decision, if permitted to stand, will have serious consequences for private antitrust actions. A writ should issue to resolve this important issue. Petitioners are

confident that the facts with respect to territorial restrictions were viewed in the light most favorable to the respondents by the Court of Appeals. If the respondents want to urge that the evidence meets a proper legal test for determining the fact of injury in a market foreclosure case, that factual resolution can be made on remand.

CONCLUSION

The dealer organization which claimed to have been restrained from making sales outside of its territory presented testimony for many days. No direct evidence of efforts to sell outside of its territory was presented. The Court of Appeals overlooked this failure of proof and searched for some circumstantial evidence to support a finding in favor of the dealer. This approach represents a radical departure from established requirements and will, if followed by other courts, cause great mischief. It ought to be reviewed.

Respectfully submitted,

Paul H. Titus
Thomas M. Kerr
Bernard D. Marcus
Jon Hogue
415 Oliver Building
Pittsburgh, Pennsylvania 15222

Ralph W. Stultz
100 East 42nd Street
New York, New York 10017
Attorneys for Petitioners